No. 03-441

Supreme Court, U.S.
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In The

Supreme Court of the United States

S.G., as Guardian Ad Litem of A.G.,
a minor, and S.G., Individually,

Petitioners,

v.

SAYREVILLE BOARD OF EDUCATION,
GEORGIA B. BAUMANN and WILLIAM L. BAUER, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT THE ISSUES DECIDED BY THE THIRD CIRCUIT 6

II. THIS CASE DOES NOT INVOLVE ANY NOVEL OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW 9

A. FIRST AMENDMENT 10

B. PROCEDURAL DUE PROCESS 19

III. CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Milbank School District, 197 F.R.D. 682 (D.S.D. 2000) 12

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) 7

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 453 (1982) 9

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) 16

Fraser, 478 U.S. at 681, 106 S.Ct. 3159 ..... *passim*

Ginsberg v. City of New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) 11, 14

Goss v. Lopez, 419 U.S. 565 (1975) 7, 19, 20

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 7, 12, 13, 14, 15

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) 15, 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) 11

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) 17

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) 11

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) 8

TABLE OF AUTHORITIES – Continued

Page

S.G. ex rel A.G. v. Sayreville Board of Education, 330 F.3d 417 (3rd Cir. 2003) ..... *passim*

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) 7, 12, 13, 14, 15

Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) 16

West v. Derby United School District, 206 F.3d 1358 (10th Cir. 2000) 12, 17

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) 10

STATUTES

42 U.S.C.A. §1983 9

COUNTERSTATEMENT OF THE CASE

On February 29, 2000, a six-year-old boy brought a gun to his elementary school in Flint, Michigan. Later that day, he shot and killed his six-year-old classmate while their teacher and class watched.

On March 4, 2000, a student at the Wilson Elementary School in Sayreville, New Jersey told other children in the morning playground line that he would "shoot the freaking teacher." The student was suspended for three days, received a consultation with the school psychologist and further conflict mediation with the school guidance counselor was recommended. Pet. App. H1, ¶ 6. In addition, outside psychological counseling for the student was recommended to his parents.

On the same date, a second student at Wilson Elementary told another child that he would put a gun in his mouth and kill him. The student who made the threat was suspended for three days, underwent a consultation with the school psychologist and the police were informed of the incident. Pet. App. H1, ¶ 7. In addition, psychological counseling was recommended to his parents. A few days later, on March 10, 2000, a third child at Wilson Elementary told another student that, "My Mommy lets me bring guns to school in my backpack." The student was suspended for three days, but no additional punishment was imposed. Pet. App. H2, ¶ 8.

After press coverage relating to one of the above-described incidents, defendant Georgia Baumann, principal of Wilson Elementary School, sent home with students

a letter to parents.[1] Pet. App. H2, ¶ 9. The letter, dated March 10, 2000, acknowledged parental concerns regarding the incident and attempted to reassure parents of the school's intent to take an "active stance" with regard to matters involving threats or statements about guns and violence in the school. In her letter, Principal Baumann asked parents to discuss with their children the inappropriateness of statements in reference to violence and weapons and the consequences resulting from making them. Principal Baumann advised that immediate disciplinary action would be taken in response to such behavior. Principal Baumann advised that she would be visiting each of the classrooms under her supervision to discuss the seriousness with which statements involving threats of guns or violence would be treated at Wilson School. The letter closed by assuring parents that their children's safety was of utmost importance, and that Wilson School would be "ever vigilant with regard to inappropriate or unsafe statements and behaviors." Pet. App. H2, ¶ 9. There was no Board "zero tolerance policy" contained in the letter. It is undisputed that there never was any policy issued by the Board establishing any "automatic" suspension or other "zero tolerance policy" relative to Petitioner's conduct.

As promised, Principal Baumann visited each classroom in the Wilson School on March 10, 2000. Tailoring her commentary to suit the age and grade level of the

[1] Although Plaintiffs assert that the minor plaintiff was absent from school on March 10, 2000 and that they did not receive a copy of this letter, teachers were instructed to send the letter home to absent students along with school assignments.

students, Principal Baumann discussed with the children the seriousness of making threats or statements about guns and violence, as well as the potential consequences thereof. Pet. App. H3, ¶ 10. On March 15, 2000, the minor plaintiff, A.G., was on the playground during his recess period with three other kindergarten students, when they began to make threats concerning weapons and shooting each other. Pet. App. H3, ¶ 11, ¶ 12. Other kindergarten children were frightened by the threats and reported them to a teacher.[2] Pet. App. H3, ¶ 13.

The kindergartner's teacher, Ms. McKenna, brought her class into the school after recess and then brought the plaintiff and the other students who made the gun-related threats to the principal's office. Pet. App. H3, ¶ 14. To do so, Ms. McKenna was forced to suspend lessons and find someone else to watch her class while she brought A.G. and the other involved children to the principal's office. Hence, Petitioner's assertion that there was no disruption is simply untrue. Not only were students upset, but the lessons in one class were suspended as a result of the ordeal.

Upon arriving at the principal's office, Ms. McKenna advised Principal Baumann about the threats. Ms. McKenna also advised that the other children were

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[2] Petitioner's assertion that only one child overheard the comments is misleading. Principal Baumann testified during depositions that she personally spoke with several children who overheard plaintiff's gun-related comments and were frightened and upset by them. In fact, one child told his teacher that he felt he had been threatened by the minor plaintiff.

frightened and upset by the words of A.G. and his friends. Pet. App. H3-H4, ¶ 15.

Once he arrived at the Principal's office, the minor Petitioner was told why he was there and given an opportunity to give his side of the story. Principal Baumann asked A.G. and the other students if they made the comments as related by their teacher. Each of the boys, including A.G., confirmed making the statements. Pet. App. H4, ¶ 16. Principal Baumann also spoke with the children who reported the incident to Ms. McKenna, and confirmed that several children were upset and frightened by the threats. Principal Baumann testified during her deposition that it was clear to her that the plaintiff understood that he acted wrongly and upset his teacher and fellow students. In considering the appropriate punishment to be meted out with regard to the incident, Principal Baumann consulted with Defendant Superintendent William Bauer and Assistant Superintendent Dennis Fyffe. Pet. App. H4, ¶ 17. Principal Baumann took into consideration A.G.'s age and abilities in deciding his punishment. Ultimately, A.G. and the other students involved in the incident were suspended for three days.[3] Pet. App. H4, ¶ 17. There was no "automatic" suspension. No other punishment was imposed, such as referral to counseling or an outside psychologist or involvement of the police as was done in other similar cases.

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[3] The only Board policies mentioned are 525 and 529, which simply convey general disciplinary authority to administrators. Petitioners have never challenged the constitutionality of these policies. Pet. App. H4, ¶ 19.

Although arguably not required to do so, principal Baumann attempted to reach A.G.'s parents via telephone at their places of business, but was unable to do so. Principal Baumann also telephoned the Petitioner's home number, and spoke with A.G.'s grandmother, with whom the Petitioners resided at the time of the incident. Principal Baumann left a detailed message for A.G.'s parents with his grandmother, asking them to contact her as soon as possible. Pet. App. H4-H5, ¶ 20. Petitioner returned in three days and finished the school year without incident.

The incident underlying this claim and the resultant punishment were never made a part of A.G.'s permanent record. Principal Baumann simply made a handwritten note of the incident on a personal legal pad that she kept in her desk.

Petitioners are incorrect in their recital of many facts in the record. By way of example, Petitioners make repeated reference to the existence of a "zero tolerance policy" of the Board. To the contrary, the Third Circuit properly found that there simply was no such Board policy. In fact, the Third Circuit specifically stated that Petitioner's claims below " . . . are not based upon any action by the Board." *S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d 417, 425 n.4 (3rd Cir. 2003) Pet. App. A15, n.4. Moreover, the Third Circuit properly held that the existence of a zero tolerance policy would not overcome qualified immunity in any event.

Similarly, Petitioners also claim that students were somehow "automatically" suspended by school officials. Petition at 3. This is not true and is not reflected in the record.

Likewise, Petitioner's reference to testimony by Dawn Myatt merits clarification. Dawn Myatt is neither a Defendant nor was she in any way involved in relevant parts of this case. She is simply a mother of a Sayreville student and a member of the P.T.A. Ms. Myatt testified during her deposition that she was simply misquoted by a reporter with regard to the comments cited by the Petitioners.[4] In any event, Ms. Myatt's comments regarding her understanding of school "policy" are of no legal relevance in this case. There is simply no Board policy at issue in this case.

Finally, there is no factual basis for Petitioner's bold assertion that "suspensions of younger students has become a more common place." Petition at 13. This is a clear attempt to give this case a gloss of significance where none is warranted.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT THE ISSUES DECIDED BY THE THIRD CIRCUIT

The Third Circuit did not issue the two holdings which Petitioners seek to review. In an attempt to gain this Honorable Court's attention, Petitioners assert that

[4] Similarly, Petitioner's repeated references to unsupported newspaper clippings referencing a "zero tolerance policy" are of no import. The Petitioner's self-serving reference to media coverage which they generated does not change the fact that discovery revealed that no relevant Board policy ever existed.

the Third Circuit created a "new standard" in First Amendment jurisprudence. Petition at 4. Nothing could be further from the truth. To the contrary, this Court simply applied the standards established by this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), and reached the decision which is entirely in accord with established and controlling law.

Similarly, in the realm of procedural due process, Petitioners assert that this case has revealed a "critical gap" in constitutional jurisprudence relating to short term school suspensions. Petition at 4. To the contrary, the Third Circuit simply applied the well-established precedent applicable to short term suspensions established by this Court in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

What the Third Circuit did decide was simply that Defendants Baumann and Bauer were entitled to qualified immunity. *S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d at 425 n.4 (3rd Cir. 2003) Pet. App. 15, n.4. This holding, is not challenged by Petitioners.[5] Hence, there exists no valid basis for grant of the Petition.

To be sure, within the context of the two-pronged qualified immunity analysis, the Third Circuit examined

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[5] Similarly, the District Court and the Third Circuit Court dismissed Petitioner's Equal Protection Claim. Petitioners have not sought Writ consideration of this issue.

the threshold question of whether Petitioner's averments amounted to a violation of constitutional rights at all, and properly decided that they did not. The court also found that since there was no clearly established law, defendants were nonetheless entitled to qualified immunity. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In so doing, the Third Circuit followed the explicit holdings of this Court. There is no conflict with the present decision and any decisions of this Court or between the holdings of the Circuit Courts of Appeal. There is neither a gap in constitutional jurisprudence nor was a "new standard" created with regard to the issues presented in this case.

It is also significant that petitioners have never challenged below the constitutionality of any actual policy of the Sayreville Board of Education. Much was made of "zero tolerance policy" allegedly promulgated by the Sayreville School Board. However, discovery revealed that the Board simply had no such policy. The discipline of the minors in this case was carried out by Principal Baumann based on the totality of circumstances in this incident. Indeed, the Third Circuit explicitly did not address such an issue, holding " . . . [w]e *need not address his claims against the Board of Education. These claims are not based upon any action by the Board . . . " S.G. ex rel A.G. v. Sayreville Board of Education*, 333 F.3d 417, 425 n.4 (3rd Cir. 2003) Pet. App. A15, n.4. Hence, the only actionable claims are those against Principal Baumann and Superintendent Bauer for which the Third Circuit properly upheld a grant of qualified immunity.

At the end of the day, the relief Petitioner sought was to expunge a fictitious permanent record of A.G.'s punishment. As the Third Circuit pointed out, there is simply no

official record to expunge. The only record retained by anyone at the Sayreville Public School consists of some personal handwritten notes on a yellow legal pad made by Principal Baumann and kept in her top drawer. This perhaps best highlights the utter lack of any far-reaching constitutional implications arising from this matter.

II. THIS CASE DOES NOT INVOLVE ANY NOVEL OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW

This case began with a typical situation, which is repeated many times over on any given day in the nations school system. To wit; a child committed an infraction on the playground, admitted the behavior when questioned about it, and was punished accordingly. The Court is faced with no more and no less than that. This Court has long acknowledged the broad discretion of local school boards in the administration of school affairs. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 863, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 453 (1982).

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public . . . school students do have substantive and procedural rights while at school. But §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgement of school administrators and school board members and §1983 was not intended to be a vehicle for federal court correction

> of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.
>
> *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (citations omitted).

Ignoring the words of this Court, Petitioners are seeking nothing less but to substitute their judgment or this Court's judgment for the judgment of the people who are charged with the day-to-day operation of the Sayreville Public Schools. The Petitioners simply wish to reverse a school discipline decision with which they disagree. While parents may often feel that in school, sport or life, their child was not treated fairly, § 1983 is not the intended vehicle for their dissatisfaction.

A. FIRST AMENDMENT

A group of five year olds were punished by their Principal for misbehaving.[6] This case presents nothing more. The decision by the Third Circuit is neither so novel nor so compelling as to warrant this Court's review. To the contrary, the decision is well-grounded in the established First Amendment precedent of this Honorable Court and is not in conflict with any decisions.

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[6] As referenced earlier, the punishment was issued by principal Baumann after consulting with colleagues Fyffe and Bauer. There was no Board policy mandating an automatic suspension. However, the Third Circuit pointed out that, even assuming that the conduct of Baumann is viewed as a "policy" of the school, qualified immunity still applied, since there was no clearly established law prohibiting punishment of such threats.

In the first instance, the petition is fatally flawed since it is based on the false premise that this playground incident is one involving "expressive" speech, ideas, or viewpoints. Petition at 14, 15. This fallacy is a readily transparent effort to gain this Honorable Court's attention and should be rejected. The Third Circuit examined the record and recognized that this case simply does not involve "expressive speech." Rather, the children made threats to shoot each other. Indeed, one would be hard-pressed to present an example of less expressive speech from a First Amendment perspective than the conduct in this case. Indeed, it is inconsistent for Petitioners to argue that these children were involved in some sort of expressive speech, yet, in the context of their procedural due process argument, state that the children had no comprehension of the meaning of their conduct.

The parameters of First Amendment rights in the setting of the nation's public schools are well-defined by this Court and were properly applied by the Third Circuit in affirming the District Court's grant of Summary Judgment. Although minors enjoy the protections of the United States Constitution, the United States Supreme Court has recognized "that the State has somewhat broader authority to regulate the activity of children than of adults." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75, 96 S.Ct. 2831, 2844, 49 L.Ed.2d 788 (1976) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944); *Ginsberg v. City of New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). That the constitutional rights of minors are not coexistent with those of adults is illustrated particularly well within the context of the nation's public schools. This Court has "repeatedly emphasized the need for affirming the

comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507.

> The constitutional rights of public school students are not automatically coextensive with the rights of adults in other settings, and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress the speech outside of the schoolhouse.

Anderson v. Milbank School District, 197 F.R.D. 682, 686 (D.S.D. 2000) (quoting *Fraser*, 478 U.S. at 682).

Hence, it is similarly well established that "the First Amendment Rights of students in public schools . . . must be applied in light of the special characteristics or the school environment." *Hazelwood*, 484 U.S. at 266. In accordance with these principles, "where school authorities reasonably believe that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of other students, they may forbid such expression." *West v. Derby United School District*, 206 F.3d 1358 (10th Cir. 2000) (quoting *Tinker*, 393 U.S. at 509).

Far from conflicting with this Honorable Court's prior decisions regarding students' free speech rights, the Third Circuit specifically evaluated the facts herein within the context of *Tinker*, *Fraser* and *Hazelwood*. After so doing, the Circuit Court concluded that there was no threshold showing of a violation of A.G.'s First Amendment rights. *S.G. ex rel A.G.*, 330 F.3d at 422. In so concluding, the Third Circuit held that "the school's prohibition of speech

threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate A.G.'s First Amendment rights." *S.G. ex rel A.G.*, 330 F.3d at 423.

The *Tinker* Court expressly distinguished the regulation of "direct, primary First Amendment rights akin to 'pure speech'" from the regulation of issues of deportment and aggressive, disruptive actions by students. *Tinker*, 393 U.S. at 506-08. These issues were also addressed in *Fraser* and *Hazelwood*, as noted in the decision of the Third Circuit.

> The Supreme Court has recognized that a balance must be struck between the student's rights and the school's role in fostering what the Court in *Fraser* termed "socially appropriate behavior." *Fraser*, 478 U.S. at 681, 106 S.Ct. 3159. Here, where the school officials determined that threats of violence and simulated firearm use were unacceptable, even on the playground, the balance tilts in favor of the school's discretionary decision-making.

S.G. ex rel A.G., 330 F.3d at 422.

The Court below simply followed the dictates of *Fraser* and held that it need not decide

> whether or if, under what circumstances, a school may violate an elementary school student's right to freedom of speech. For our purposes it is enough to recognize that a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting.

Id. at 423.

The decision below is consistent with the opinions of this Court and the Circuit Courts of Appeals that have addressed the issue of First Amendment rights in the nation's public schools insofar as the age of the student is concerned. This Court has recognized that the maturity level of the target audience in cases involving student speech will play a factor in the consideration of school official's regulation of it. That the maturity of the student audience might prove important in First Amendment analysis was first hinted in *Tinker*, where Justice Stewart, concurring in the result, reiterated sentiments expressed in a prior opinion that a state could determine that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (citing *Ginsberg v. New York*, 390 U.S. 629, 649-50, 88 S.Ct. 1274, 1285-86, 20 L.Ed.2d 195 (Stewart, J., concurring)).

The reference to audience maturity contained in Justice Stewart's concurring opinion in *Tinker* was made more explicit in the majority opinions in *Fraser* and *Hazelwood*. Confronted by a high school student's sexually charged speech made to an audience composed of fellow pupils, the maturity level of that audience was central to the reasoning of the *Fraser* Court. The Court specifically noted that the speech at issue "could well be seriously damaging to its less mature audience, many of whom were only 14 years old at the time and on the threshold of awareness of human sexuality," and held that the discipline imposed on the speaker was constitutional. *Fraser*, 478 U.S. at 633.

The *Hazelwood* Court, in upholding a school's decision to excise certain material from a student-published school newspaper, expressly stated that regulation of school

sponsored speech was acceptable to ensure that "readers or listeners are not exposed to material that may be inappropriate *for their level of maturity*." *Hazelwood*, 484 U.S. at 271 (emphasis added).

Circuit Courts of Appeals have followed suit with this Honorable Court's decisions evaluating First Amendment challenges within the nation's schools in light of the maturity of the student population. The interplay of *Tinker*, *Hazelwood*, and *Fraser* as to the relevance of age in the consideration of the First Amendment rights of students was considered by the Seventh Circuit Court of Appeals in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996). In weighing an elementary student's challenge to school restrictions placed on the student's ability to disseminate invitations to a religious meeting, the *Muller* Court acknowledged that the Supreme Court has not expressly extended to grade school children the free expression rights first announced in *Tinker*. *Id.* at 1538. Following precedent established by this Court, the *Muller* Court explained

> Age is an important factor in student speech cases. . . . If a high school can suppress speech to protect 14-year-olds from sexual innuendo at a voluntary school assembly (*Fraser*), and if it can delete entire pages from a school newspaper because they touch on 'sensitive topics' (*Hazelwood*, 484 U.S. at 272, 108 S.Ct. at 570) it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the

> means of expression. Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate.

Muller, 98 F.3d at 1538.

The rationale of the *Muller* Court recalls that of *Fraser*, wherein the Supreme Court found the mission of the public schools to instill socially appropriate behavior and moral standards central to its ruling. That elementary school students' First Amendment rights are more amenable to regulation than those of their older counterparts makes sense on this level as well. Students who are still learning the basic concepts of behavior and social interaction should be subject to discipline in a way that will ensure that this mission is achieved. As noted by the *Muller* Court

> the "verbal cacophony of a public forum, can be antithetical to the delicate "custodial and tutelary" environment of an elementary school. The cultivation of the "habits and manners of civility" that *Fraser* held "essential to a democratic society," can require a level of parentlike guidance that has no place in a public forum. Declaring the elementary school classroom, hallway, or playground forums for unfettered student communication would require either a severe incursion into the critical educational mission of the elementary school or a substantial contraction of the First Amendment protections afforded speech in a public forum.

Muller, 98 F.3d at 1539 (quoting *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655, 115 S.Ct. 2386, 2392, 132 L.Ed.2d 564 (1995); *Fraser*, 478 U.S. at 681)

Other Circuit Courts considering student speech have been consistent with this notion. *See*, e.g., *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) ("schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683; *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).

Hence, even if this case dealt with political viewpoints or opinions, which it does not, the Third Circuit properly invoked the guidance of this Honorable Court in *Fraser*, when it held that "The First Amendment guarantees wide freedom in matters of *adult* public discourse," but cautioned that "it does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Fraser*, 748 U.S. at 682. The holding of *Fraser* has even greater applicability here where we are dealing with 5 year old children.

In an additional attempt to convert the mundane to the extraordinary, Petitioners attempt to raise the alarm that schools are now heading down the slippery slope of pressing "an agenda of pacifism at a time when American soldiers are being killed in far away lands." Petition at 15. Following this logic, Petitioner would have this Court hold that kindergarten teachers should likewise refrain from requiring children to sit quietly in their seats, avoid shooting spitballs, or calling each other names at the risk of indoctrinating pacifism or be subject to lengthy litigation.

Petitioner seems to contend that it is a novel concept that the educators of very young children have, as one of their missions, the goal of fostering "socially appropriate

behavior". To the contrary, this Court in *Fraser* recognized ". . . . society's countervailing interest in teaching students the boundaries of socially acceptable behavior" *Fraser*, 478 U.S. at 681. In the case at hand, the Defendants were faced with the nationally publicized murder of a first grader by another first-grader in Michigan and, in Defendant's very own school, three other recent incidents involving threats made by students regarding the use of guns and violence. It is misguided to suggest that a case of constitutional proportions is raised when a fourth group of children is punished for frightening others by stating "I am going to shoot you". This is not a case involving "core", "political" speech or "viewpoints". This is a case about children threatening to shoot each other on a playground which understandably frightened other children given the tragic events that had occurred in the preceding weeks.

Petitioners have raised hypothetical situations seeking to avoid the undisputed facts at hand. By way of example, Petitioners query as to the appropriate school reaction if a student were to espouse his "views" on killing Osama Bin Laden or the acceptability of deer hunting. Petitioners are creating these hypothetical "viewpoints" simply because there are no viewpoints at issue in the actual case before this Court. Indeed, the Third Circuit specifically held that it need not decide the broader question of whether, if and under what circumstances a school may violate an elementary student's right to freedom of speech. *S.G. ex rel A.G.*, 333 F.3d at 423. Pet. App. A11, A12. To the contrary, the Court simply held that under *Fraser*, the Defendants were upholding a reasonable pedagogical concern when acting in response to speech threatening violence and the use of firearms by these students, particularly in the context of the prior weeks of

threats and violence. Moreover, the Court pointed out that qualified immunity undoubtedly applied in that there was certainly no clearly established law prohibiting the defendants' actions.

Petitioners seek nothing less than to render it unconstitutional for a teacher or administrator to punish children for simple misbehavior. This is a dubious goal and it most certainly is contrary to the holdings of this Honorable Court. Petitioner suggests that this Court should abandon its well-established precedent and adopt a new standard, which would take even a modicum of control away from school administrators and place it in the hands of five-year-olds. Rowdiness, threats, and the general whims of these children of tender years would need to be tolerated lest school administrators run the risk of defending lawsuits such as this, instead of teaching our children.

B. PROCEDURAL DUE PROCESS

Contrary to petitioner's assertion, the procedure to be followed in cases of "short term" school suspensions of ten days or less is plainly set forth by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975). This precedent was explicitly followed here by the Third Circuit Court of Appeals. There is no "gap" in jurisprudence as asserted by Petitioners. The law is clear and was properly applied. In cases of suspensions of ten days duration or less, due process requires that the student be "given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. at 581.

Petitioners seem to rest their entire argument in favor of a new standard on a false premise – that A.G. did not "comprehend what happened". Petition at 7. As the Third Circuit pointed out, the record in no way supports Petitioner's contention in that regard. *S.G. ex rel A.G.*, 333 F.3d at 424. To the contrary, the record shows that this was not a very complicated situation: the boys were brought to the Principal's office, asked for there side of the story, admitted and understood what they did, and were given a minor punishment.

Here, we are dealing with the shortest of short-term suspensions. Lesser procedures than those used here have been found sufficient for suspensions three times as long under the standard set forth in *Goss*. Here, for example, the Principal made phone calls to the parents and spoke with A.G.'s grandmother – steps arguably not even required under the *Goss* standard.

Petitioners do not even allege any conflict or inconsistency between opinions of this Court and any Circuit Court in seeking review of this matter. Instead, Petitioners seek to ignore *Goss*. Hence, their Petition should be denied outright. Moreover, the proposition put forth by Petitioners would turn on its head the day to day ability of our schools to monitor and sanction minor infractions. Indeed, Petitioner would have this Honorable Court set up miniature tribunals before disciplining kindergarten students. This purported result is not only ludicrous, but inimical to established precedent.

III. CONCLUSION

This case does not implicate any important constitutional issues or conflicts. The Court of Appeals for the Third Circuit simply held that, in this case, under these particular facts, Principal Baumann and Superintendent Bauer did not violate any constitutional rights of this kindergarten student and were entitled to qualified immunity. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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